89-1864

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CASE NO.:

in the

Supreme Court

of the

United States

OCTOBER TERM, 1989

DUVAN ARBOLEDA, INDIVIDUALLY AND AS PRESIDENT OF GOLD AND GEMS TRADING, INC.,

Petitioner/Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent/Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Honorable Court should reexamine the standards of proof of a claimant relying on the "innocent owner" defense in a civil forfeiture action, in light of the failure of either this Court, or of the lower federal courts to establish meaningful criteria to guide the pre-seizure behavior of those seeking to avoid forfeiture.

LIST OF INTERESTED PARTIES

TRIAL JUDGE	**William J. Rea**
PETITIONER	**Duvan Arboleda**
UNITED STATES OF AMERICA	**Phillip Malinsky Assistant United States Attorney**
ATTORNEY FOR PETITIONER	**Marc L. Barbakoff, Esq.**
ALLEGED VICTIMS	**None**

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Petitioner/Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent/Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH JUDICIAL CIRCUIT

The Petitioner, DUVAN ARBOLEDA, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Judgment of the District Court, and its Findings of Fact and Conclusions of Law are reprinted herein. (A1-7). The opinion of the Court of Appeals for the Ninth Circuit affirming the Judgment of the District Court in United States v. $215,300.00 United States Currency, 882 F.2d 417 (9th Cir.1989), was rendered on August 14, 1989, and is reprinted herein. (A 8-17). The Petitioner's timely-filed (after an extension was granted by the Court) Petition for Rehearing was denied by the Court on February 13th, 1990 (A18), and the Mandate issued on March 29, 1990.

JURISDICTION

This Petition arose in the first instance from a Complaint for Forfeiture filed in the District Court for the Central District of California. Jurisdiction vested in the District Court by virtue of Title 21 U.S.C. §881 and

Title 28 U.S.C. §1345. The opinion rendered by the Court was appealed to the United States Court of Appeals for the Ninth Circuit pursuant to the jurisdiction authorized by Title 28 U.S.C. §1291.

This Court has jurisdiction over this Petition pursuant to 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Constitution of the United States, Amendment V

No person shall be shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty,

or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 21 U.S.C. § 881

§ 881. Forfeitures

Subject Property

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or

omission established by that owner to have been without the knowledge or consent of that owner.

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition Below

The Claimant, DUVAN ARBOLEDA, found by the district court to be a legitimate businessman engaging in a legitimate trade, took cash obtained from a legitimate source, for a legitimate purpose, and gave it to a trusted, and heretofore trustworthy employee, to be utilized for a legitimate business purpose. He filed every reporting form required by the government to document the transactions. Because the government suspected, on the basis of totally unconfirmed rumor and hunches, that the monies were connected to an unspecified drug transaction, the Claimant was

divested by the government of over two hundred thousand ($200,000.00) dollars.

On April 25th, 1985, the defendant currency was seized from a passenger boarding a domestic flight at the Los Angeles International Airport. On May 24, 1985, the Plaintiff filed its Complaint for Forfeiture. The Claimant, DUVAN ARBOLEDA, timely-filed his answer on July 19, 1985, in his own behalf, and on the behalf of GOLD & GEMS TRADING, INC., contesting the forfeiture.

After discovery was taken on behalf of the parties, the case was heard by the Court in a three day non-jury trial which began on March 27, 1987, and concluded on April 1, 1987.

At the beginning of the trial, the Claimant asked the Court to consider a Motion to Dismiss which had been served on the government on the 24th of March. The

Court refused to consider the Motion, deeming it untimely.

On April 3, 1987 the Court entered its Judgment and Order of Forfeiture. (A 1). The trial judge, while stating in open court that the claimant was an innocent businessman, entered its findings of fact and conclusions of law upholding the seizure. (A 2-7).

The Claimant timely-filed his Notice of Appeal on April 13, 1987. After the filing of the required briefs, the case was submitted to the Court. The Court's opinion, which affirmed the trial court's order of forfeiture, was rendered on August 14, 1989. A Motion for Rehearing was, after an extension was granted, timely-filed on September 7, 1989. The Ninth Circuit denied the Motion for Rehearing without opinion on February 13, 1990. Its Mandate was issued on March 29, 1990. This Petition followed.

(ii) Statement of Facts

On April 25, 1985, Michael D. Farrant, a local law enforcement agent, was on duty at the Los Angeles International Airport (LAX). During the period material to this appeal, Farrant was concerned with monitoring passengers of Eastern Airlines Flight Number 504, which departs LAX around midnight, and flies nonstop to Miami (Florida) International Airport. Farrant testified that he was interested in the passengers boarding that flight because, according to him, it was often used by money couriers. At approximately 10:15 to 10:20 that evening, almost 2 hours before the scheduled departure of Flight 504, Farrant observed Alvaro Dario Hoyos (Hoyos) exiting a taxi outside of the Eastern Airlines ticketing building. This was the first time that any law enforcement officer had observed Hoyos. In other words, Hoyos was not under

suspicion for any illegal activity at the time Farrant first observed him.

Hoyos was carrying one piece of luggage, and a woman and two children exited the same vehicle. The four people entered and stood in a ticket line at Eastern Air Lines. Farrant ceased his surveillance of Hoyos, but subsequently saw him, a short time later, as Hoyos approached a security checkpoint on the way to the domestic flight departure gates. Hoyos was alone.

At this point, the officer had no idea if Hoyos had previously purchased a ticket, or purchased one at the airport for cash, charge card, or check. Farrant noticed that Hoyos was walking strangely and holding his left hand against his body. The position of Hoyos left hand disturbed the normal line of his suit jacket, and enabled Farrant to see a bundle of U.S. currency in his jacket pocket.

After Hoyos cleared security, Farrant introduced himself as a police officer and asked Hoyos if he could speak with him. Hoyos said he didn't mind, but that he was running late for a flight. Hoyos was not booked on the midnight EAL Flight 504 (the flight Farrant said was used by drug couriers), but on an earlier Eastern Airlines flight which was departing for Atlanta at 10:45 P.M. According to Farrant, he also told Hoyos that he was conducting a narcotics investigation, and Hoyos was free to go, but that he would like him to answer some questions.

Farrant testified that Hoyos was cooperative, and that upon the officer's request, produced identification, an Eastern Airlines ticket (which was not for Flight No. 504), and a baggage claim check for the suitcase Farrant had seen earlier. It had apparently been checked.

There was no testimony produced that Hoyos was not using his correct name. In other words, Hoyos fit the "profile" of a typical legitimate passenger, rather than that of a smuggler or courier.

The flight Hoyos was booked on was to Miami, through Atlanta, and departed LAX about 70 minutes earlier than Flight 504. Farrant testified, in response to a leading question from government counsel, that he had made "a few" money seizures from passengers on this particular flight. One tends to believe that his answer would have been the same for any other flight connecting with Miami.

Farrant testified that it was his "feeling" that people, by traveling to another city prior to going to Miami, were trying to throw the police off. It should be noted in passing, however, that Eastern Airlines flies the huge majority of its flights through Atlanta. It is hardly a

deceptive practice. In fact, Farrant knew of only one nonstop direct flight from LAX to Miami. He had no knowledge as to whether the nonstop LAX-Miami flight (Flight 504) was full. Farrant further testified that Jarbel Travel, the travel agency used by Hoyos, had been used by money couriers 20-30 times in the past four years.

During the interview in the concourse, he noticed a bulge around Hoyo's waist. When he asked how much currency Hoyos was carrying, Hoyos indicated a total of $15,000.00. When he patted Hoyos down, Hoyos became increasingly nervous.

Farrant indicated to Hoyos that he was not under arrest, but that he wanted him to accompany him to an interview room, and that Hoyos would probably miss his flight. Hoyos walked back to the DEA office with the officer.

On the way to the office, Farrant asked Hoyos to whom the money belonged. Hoyos said that he was employed by a travel agency, later showing his employment I.D., and that the money belonged to the agency. Hoyos told Farrant that he wanted a receipt for it, indicating that Farrant had already indicated at this time that the money was to be confiscated.

When the two arrived at the DEA office, Farrant again told Hoyos that he was not under arrest, and asked him to take the money out so that it could be counted. Farrant testified, and would have the Court believe that Hoyos, after being placed in an examining room, spontaneously began to take off various articles of clothing, including his trousers, as he placed the money on a table in the cramped interview room. Pictures were taken of the money, and of Hoyos in various states of undress.

Farrant asked him why he was carrying the money. Hoyos replied that it was to purchase gems and gold.

In addition to the money, the officer found an airline ticket from Miami to Los Angeles purchased on April 24th, for travel on April 25th, and an identification card issue by Jarbel Travel and bearing Hoyos' name. The luggage Hoyos had checked with Eastern Airlines was recovered and searched, apparently without anyone bothering to ask Hoyos for permission. Nothing of consequence, and certainly nothing illegal, was discovered. Ultimately, Farrant testified, the money was seized, but Hoyos was free to go.

For its second witness, the Plaintiff called DEA Agent Mark Inouye. Inouye was also stationed at LAX during April of 1985, and although not involved in the stop, he was the agent who took the pictures of Hoyos and the money. He

testified that, in response to his inquiry, Hoyos told him that he was carrying the money to purchase gold. Inouye also noted that Hoyos was in the country legally.

As part of his investigation, Inouye ran Hoyos' name through the Narcotics and Dangerous Drugs Information System computer (NADDIS). It indicated that Hoyos had an arrest in New York nine years earlier for an involvement with marijuana but no conviction. He further stated that Jarbel had previously been used by one(!) narcotics trafficker (who the government could not identify by name), and that he had previously encountered the name Jarbel in connection with money seizures.

Finally, he testified that NADDIS identified the claimant, DUVAN ARBOLEDA, and Edilma Perez, the customer who paid ARBOLEDA a substantial amount of money for gold, as being involved in narcotics in

Miami. Perez was the customer whose money was given to Hoyos for the purchase coins and gold.

Inouye admitted, under cross-examination, that he had no idea who put the information regarding the claimant, Hoyos, or Perez into the NADDIS computer, and that he had not verified its veracity, or even whether the persons identified as being involved in narcotics were actually the same people involved in the instant case. He also admitted that the Claimant, DUVAN ARBOLEDA, had no criminal record whatsoever.

Inouye, who was not present during the search of Hoyos, testified that on the day after the seizure, he contacted U.S. Customs Officer John Leahan to "search" the currency with a narcotics dog for traces of controlled substances. The dog indicated that there were traces of controlled substances on the bills.

Obviously, the dog could not indicate how long the controlled substances had been on the bills, or how the bills had been exposed to the substance(s).

The claimant produced an expert witness, Dr. Terry Hall, who testified that virtually every denomination of currency, and certainly every bill of the denomination seized, contained traces of controlled substances, and thus would cause a narcotics sniffing dog to alert.

Hall, who has a Ph.D. degree from Auburn University with a specialty in spectroscopy and a minor in analytical chemistry, was qualified by the Court as an expert capable of rendering an opinion on the incidence of currency being tainted by residue from controlled substances. Hall was a former forensic chemist with the Florida Department of Law Enforcement.

The Defendant currency passed through Miami, a city which, unfortunately, is

inundated with illegal controlled substances, and was kept in a safe which often was used as a receptacle for large amounts of cash used in the Claimant's business.

Dr. Hall testified that currency from many metropolitan areas, including Miami, inevitably picks up detectible traces of controlled substances, even at banks where the traces accumulate in counting machines. It is virtually unavoidable.

Dr. Hall and his associates conducted tests of currency in eight metropolitan areas: Miami, Florida; Dallas and Fort Worth, Texas; Milwaukee, Wisconsin; Syracuse, New York; Pittsburgh, Pennsylvania; Los Angeles, California; and Seattle, Washington. Of the bills collected randomly in these cities, Dr. Hall found detectible amounts of controlled substances in (90) ninety percent of the bills tested by him.

In the test most germane to this case, Dr. Hall tested bills taken from various persons in the South Florida area. Bills were obtained from the following persons, all of whom were outstanding citizens with impeccable reputations:

1. The Mayor of Dade County (the county in which Miami is located).

2. The City Manager of Fort Lauderdale.

3. The Catholic Archbishop of Miami.

4. Jeb Bush, the son of then Vice President George Bush.

5. The publisher of the Miami Herald, South Florida's largest daily newspaper.

6. The editor of the Miami Herald.

7. A former Miss America, from West Palm Beach.

8. The Sheriff of Broward County (the county in which Ft. Lauderdale is located).

9. Three other persons whose exact identities the witness could not recall.

After the bills were taken from the possession of the eleven individuals, they were tested for the presence of controlled substances. With the exception of the bill obtained from Nick Navarro, the Sheriff of Broward County, each and every one of the bills contained measurable traces of cocaine! (The Sheriff went to a local bank and got a new bill.). A similar test on currency acquired in the Los Angeles area yielded almost identical results.

In addition, the Claimant testified, and introduced other evidence, including his individual and corporate tax returns for the prior ten years, which the Court ruled had established that he was a legitimate businessman, dealing in gold and precious gems.

The tax returns conclusively demonstrated that the gross receipts of the Claimant's business, as reported to

the Internal Revenue Service, numbered several million dollars annually.

The Claimant also produced written records, including copies of timely-filed U.S. government currency reporting forms reflecting numerous large monetary transactions with Edilma Perez.

The Claimant's testimony, coupled with that of other witnesses for Claimant, established that dealers in gold and precious gems, such as Claimant, habitually dealt in large amounts of cash. In addition, one of them testified that he normally carried the cash secreted on his person, rather than in an attache case. Consequently, there was nothing inherently suspicious about Hoyos' handling of the money.

The Claimant testified that he had been friends with Hoyos since childhood, and had utilized him as to exchange cash for gems or gold on at least two prior

occasions. Hoyos never evidenced any untrustworthiness whatsoever. Nor had he, to the Claimant's knowledge, been engaged in any illegal activities. In short, the Claimant had every reason to trust Hoyos, and none to distrust him.

The legitimate source of the particular currency seized by the government was clearly established by the Claimant at the trial. On April 20, 1985, five days prior to the seizure, Hoyos traveled to Venezuela to pick up scrap (impure) gold valued at close to two hundred thousand ($200,000.00) dollars. Hoyos returned to Miami with the gold on April 23rd. He was directed by ARBOLEDA to file the appropriate forms with customs. In fact, the Claimant had employed a customs broker for many years who met Hoyos upon his return to the U.S. and insured that the correct forms were filed. Said forms were introduced into evidence by the Claimant

at trial. The broker's name was the Robbins company. The money to purchase the gold had previously been wired to Venezuela to an exchange house by the name of Italcambios. Documents establishing the wire transfer were admitted into evidence at trial.

On April 24, 1985, one day before the seizure, a lady by the name of Edilma Perez came to the Claimant's office. Perez was also in the gold business, and ARBOLEDA had dealt with her on many occasions in the past. Perez paid for the gold with two hundred and five thousand ($215,000.00) in cash. She paid him in cash about 70% of the time.

Arboleda filed the appropriate federal currency reporting form in order to report the cash transaction to the government. Later in the day on April 24th, ARBOLEDA gave the money he received from Perez to Hoyos to buy some 600 Mexican coins which

were selling in California in the "low 300's." When given the cash by ARBOLEDA, Hoyos put it into an attache case.

Thus, the legitimate genesis and purpose of the money given to Hoyos, and later seized by and forfeited to, the government, was established by the Claimant.

There was no testimony concerning this transaction which indicated that ARBOLEDA acted in any way other than as a prudent businessman. ARBOLEDA merely gave money to a man he had known and trusted for 25 years, and with whom he had done business in the past. If, indeed, Hoyos intended to use this money to purchase controlled substances, ARBOLEDA had no knowledge of it, and no means of forestalling it.

There was no testimony that ARBOLEDA had knowledge of the alleged, but unconfirmed arrest of Hoyo's for marijuana some nine years earlier. Nor was there any

testimony that Hoyos was ever convicted. The government's "proof" on this issue scarcely rose above the level of an unsubstantiated rumor.

The source of the currency was established, and its purpose to buy coins was not contradicted. But the mere possession of currency, the legal tender of this country, now warrants forfeiture. Possession warranting forfeiture is "enhanced" when a day later a dog barks and scratches (as the dog would on 90% of the currency in circulation). On such flimsy suspicion, citizens are subjected to legitimized theft.

REASONS FOR GRANTING THE WRIT

(i) The Supreme Court has historically exercised jurisdiction in cases where issues of great public importance have been raised, even where traditional grounds for review, such as conflicts between the circuit courts, or between

this Court and a circuit court, have been absent. See, e.g. *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957). Further, the 1988 revision to 28 U.S.C. § 1254 was enacted to ensure that the Court would have unlimited discretion over which cases it chose to consider.

Even prior to the 1988 revision, however, the Court frequently exercised jurisdiction to consider questions of great public importance, particularly when the issues were recurrent. *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231 (1959). The instant case is one involving recurrent issues of great public importance.

Government forfeiture has become big business, and a major source of income for the United States with significant potential for abuse. The recent "zero tolerance" policy whereby a huge multi-million dollar vessel could be confiscated

and forfeited upon the finding of a single marijuana cigarette (or seed!) in a remote area of the vessel is a dramatic example of the damage myopic officials can wreak.

Government sources estimate that approximately one hundred and ten billion dollars is laundered through banks annually. As of the date of this petition, there were one thousand, two hundred and thirty-four (1243) seizures involving some one hundred and forty-nine million, three hundred and eighty-nine thousand dollars ($149,389,000) in cash and property awaiting forfeiture in the Southern District of Florida alone.

This amount includes four hundred and thirty-two (432) parcels of real estate valued collectively at one hundred and four million, three hundred and ninety-three millions dollars ($104,393,000), three hundred and seven seizures of cash, collectively valued at twenty four million

and ninety-seven dollars ($24,097,000), sixty-five (65) vessels, collectively valued at seven million, nine hundred and thirty-three thousand dollars ($7,900,000), three hundred and sixty-seven (367) vehicles, collectively valued at four million, nine hundred thousand dollars ($4,900,000), forty-two (42) caches of jewelry, collectively valued at four million, seventy-six thousand dollars ($4,076,000), and thirty (30) aircraft, collectively valued at three million, nine hundred and ninety thousand dollars ($3,990,000).

Even allowing for the fact that the Southern District of Florida is one of the districts in which the amount of forfeitures is the greatest, the dollar amount of forfeitures every year is astronomical, and continually increasing. Even in its virtual infancy as a prosecutorial tool to combat drug

trafficking, forfeitures produced vast amounts of revenue for the federal government. In 1979-1980 the Drug Enforcement Administration (D.E.A.) alone seized assets totalling nearly one-half its annual budget.

Simultaneous with this tremendously increased rate of forfeitures, has been a corresponding erosion in the protections established by Congress to protect "innocent owners" of seized property. As noted above, Title 21 U.S.C. §881(a)(6) provides that:

"...no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been without the knowledge or consent of that owner."

The courts have construed the "knowledge and consent" clause of this statute to allow forfeiture upon the alleged

"negligence" of an owner to foresee the actions of a person or persons to whom the property was entrusted. In doing so, legitimately innocent owners have been required to conform to an essentially undefined, but impossibly high standard of omniscience, if not behavior.

In *Colero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974), this Court stated that,

"[It] would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent.... Similarly, the same might be said of an owner who proved not only that he was uninvolved and unaware of the wrongful activity, but also that he had done all that reasonable could have be expected to prevent the proscribed use of his property; for in that circumstance, it

would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive."

Unfortunately, contrary to the language quoted *supra*, the courts have had virtually no difficulty coming to such a conclusion even in factual situations wherein it is difficult, if not impossible to ascertain what further steps an innocent owner might have taken to protect the property. Certainly, neither this Court, nor the lower federal courts, have established any code of behavior which would meet the burden of Calero-Toledo.

In the instant case, for example, the court, in essence, found that a legitimate businessman, conducting business in a way consistent with the practice extant in his industry, should have foreseen and taken steps to avoid the possible misuse of monies by his boyhood friend, notwithstanding the fact that the

friend had never been convicted of a crime, and had no known or ascertainable connection with illegal activity. The fact that the Claimant had used Hoyos' services previously, without incident, further serves to make the forfeiture of monies of no societal value.

This Court stated in *Calero-Toledo, supra.*, 416 U.S. at 688, that:

"To the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property."

In the instant case, however, and in a myriad of other cases throughout the federal court system, claimants are being required to have conducted their business or personal affairs in a manner which is

not only inconsistent with common sense, but also for which the courts and legislature have given no standards, or worse, conflicting standards.

In *United States v. Four Million, Two Hundred Fifty-Five Thous.*, 762 F.2d 895 (11th Cir.1985), for example, the Court of Appeals for the Eleventh Circuit specifically rejects the concept that property may properly be forfeited from an owner on the grounds that he "should have known" that money he possessed was drug-generated. The Court stated (762 F.2d at 906) that:

"We agree with [the Claimant] that the application of the statutory "innocent owner" defense turns on the claimant's actual knowledge, not constructive knowledge."

In a footnote on the same page, the Court goes on to say:

"The government argues that we should replace the "actual knowledge" standard with the "negligence" standard discussed by the Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974). In *Calero-Toledo*, the Court addressed a due process challenge to a forfeiture, under a Puerto Rico statute, of property belonging to an alleged "innocent owner." The Court upheld the forfeiture, but stated in dicta that '[i]t ... has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent.... Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done *all that reasonably could be expected* to prevent the proscribed use

of his property....' Id. at 689, 94 S.Ct. at 2094-95 (emphasis added). Also, see *U.S. v. 1964 Thunderbird*, 445 F.2d 1064 (3rd Cir.1971).

Calero-Toledo did not involve the statutory "innocent owner" defense contained in 21 U.S.C. § 881(a)(6), we question the government's invocation of the *Calero-Toledo* dicta in this case."

Nevertheless, in the instant case, the *Calero-Toledo* negligence standard is utilized, without analysis, in a forfeiture action brought pursuant to Title 21 U.S.C. § 881(a)(6). This lack of guidance, and consequent disparity in decisions throughout the federal court system, merit the attention of this Court.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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PROOF OF SERVICE

COMES NOW, Marc L. Barbakoff, Esq., on behalf of the Petitioner, DUVAN ARBOLEDA, et al., and states to this Court:

1) That on May , 1990, the attached Writ of Certiorari submitted on behalf of the Petitioner was mailed at the United States Post Office, Miami, Florida.

2) I certify that a true and accurate copy of the foregoing Petition for Writ of Certiorari has been furnished to Kenneth W. Starr, Solicitor General of the United

States, 10th and Constitution, N.W., Washington, D.C. 20530.

3) Said statement is being submitted to this Court pursuant to Rule 28.2 of the Rules of the Supreme Court.

MARC L. BARBAKOFF, ESQUIRE
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MIAMI, FLORIDA 33180
(305) 932-0550

MARC L. BARBAKOFF, ESQ.

SWORN TO AND SUBSCRIBED before me this ____ day of May, 1990.

NOTARY PUBLIC, STATE OF FLORIDA

My commission expires:

Appendix

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 85-3504-WJR(JRx)

UNITED STATES OF AMERICA,

Plaintiff,

v.

$215,300 U.S. CURRENCY,

Defendant.

JUDGMENT

This action came on for trial before the Court, the Honorable William J. Rea, United States District Judge, presiding, the issues have been duly tried, and a decision have been duly rendered.

It is hereby ORDERED, ADJUDGED, and DECREED that the plaintiff United States of America have forfeited to it the defendant U.S. Currency in the sum of $215,300.00.

DATED: April 3, 1987.

/s/ William J. Rea
WILLIAM J. REA
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 85-3504-WJR(JRx)

UNITED STATES OF AMERICA,

Plaintiff,

v.

$215,300 U.S. CURRENCY,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter was tried by the Court commencing on March 27, 1987. The Court, being advised in the premises, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This is an action to forfeit the defendant currency on the ground it was furnished in exchange for a controlled substance in violation of 21 U.S.C. §881, and/or was money traceable to such an exchange, and/or was money intended to be used to facilitate a violation of that statute.

2. On April 25, 1985, at approximately 10:20 p.m., Los Angeles Police Department Detective Michael Farrant was on duty at the Eastern Airlines terminal at Los Angeles International Airport. His attention was drawn to

a Latin male, subsequently identified as Alvaro D. Hoyos-Melguizo (Hoyos), because he appeared to have difficulty walking and appeared to be uncomfortable as he walked past him. Farrant also observed that Hoyos was holding his left arm against his left coat pocket as he was walking, as though he was concealing an object within his coat. Farrant saw a bundle of money in his inner coat pocket. Hoyos did not have any hand-carried luggage and appeared to be traveling alone.

3. Detective Farrant appoached Hoyos after he had cleared the security checkpoint, displayed his LAPD identification card, and told him in English he was a LAPD officer. He obtained Hoyos' consent to talk to him. There was no language barrier between them.

4. Detective Farrant advised Hoyos that he was conducting a narcotics proceeds investigation for passangers departing Los Angeles through LAX. He told Hoyos that he would like to ask him some questions, that he did not have to answer any of the questions, that he was not under arrest, and was free to walk away. Hoyos stated that he did not object to being asked some questions.

5. Upon request, Hoyos produced a Miami, Florida, driver's license and an Eastern Airlines ticket, with one baggage claim stub attached, in the same name, destination — Atlanta, Georgia, departing 10:45 p.m. that evening. His final destination was Miami, Florida. However, Hoyos had an open ticket to Miami. Detective Farrant then returned these items to Hoyos. (Later at the DEA/LAX office it was learned that Hoyos had flown that morning from Miami to Los Angeles on Pan American Airlines.)

6. When asked by Detective Farrant whether he had a large sum of money on his person, Hoyos indicated that he did, pointing to his right coat pocket, where he said there was $5,000. Furthermore, he stated that he had $10,000 in his left coat pocket for a total of $15,000. Hoyos allowed Detective Farrant to view the money by displaying his coat pockets one at a time.

7. Detective Farrant asked Hoyos if that was all the money he had with him. Hoyos replied that he did not have any more money with him. Detective Farrant was given permission to conduct a pat-down search of Hoyos' person, whereupon he discovered a thick, bulky attachment around his waist. Detective Farrant noticed a red and white tape which was visible through Hoyos' shirt. At that time, Detective Farrant observed that Hoyos became very nervous and started to sweat as he continued talking to him. Hoyos' hands appeared to be trembling. The Court finds the search of Hoyos was voluntary.

8. Detective Farrant asked Hoyos if he would accompany him to the DEA/LAX office for further investigation regarding the money. Hoyos was advised that he was not under arrest and did not have to go with him. Furthermore, Detective Farrant told Hoyos that although he would probably miss his flight, he would be able to catch a later flight direct to Miami without incurring any additional monetary expense. Hoyos agreed to go to the DEA/LAX office.

9. As Detective Farrant and Hoyos were walking toward the DEA/LAX office, Detective Farrant asked Hoyos to whom the money belonged. Hoyos stated that it belonged to the travel agency which he owned. He next

stated that he wanted a receipt for the money.

10. Upon arrival at the DEA/LAX office, Detective Farrant again reminded Hoyos that he was not under arrest. Hoyos was taken to a small room. Detective Farrant asked Hoyos to take out the remainder of the money he suspected Hoyos was carrying. Thereupon, Hoyos began to remove his pants and shoes. At this time DEA Special Agent Mark Inouye joined the investigation.

11. Agent Inouye observed that Hoyos had an apron of some type which was strapped to his mid-section by use of red and white "TWA" tape to secure the apron to his waist. The "apron-like" cloth contained pockets of paper money. Furthermore, Hoyos had concealed another large quantity of currency along the calf portion of both his legs, inserted within knee-length dark red socks. The currency found on Hoyos' person comprised $100 and $50 U.S. dollar bills. Agent Inouye photographed Hoyos with the money strapped to his waist and stuffed in his socks. Hoyos agreed to be photographed.

12. Hoyos stated that the reason for carrying such a large amount of currency was to purchase a quantity of gold and gems. Furthermore, Hoyos advised Detective Farrant that he was carrying a total of $216,000, less $700 for his personal expenses. Hoyos at that point stated that he did not wish to make any further statements until he could speak to his attorney.

13. Agent Inouye then determined that Hoyos had a record in DEA intelligence records and had a prior arrest for marijuana trafficking. The defendant currency was seized pursuant to 21 U.S.C. §881(a)(6) and counted. Hoyos

was issued a receipt for the money totalling $215,300, and departed the office at approximately 11:30 p.m. to 12:00 midnight.

14. The seized money was placed in a sealed package by Agent Inouye and stored. On the following day, Agent Inouye opened the heat-sealed envelopes containing the money and secreted the money in a bottom right drawer at the DEA/LAX office. At approximately 4:30 p.m. LAPD Officer Don Leahan and LAPD K—9 "Buster" searched a portion of the office. "Buster" alerted to the desk drawer containing the money and began biting and scratching at the drawer. Officer Leahan advised Agent Inouye that "Buster" had indicated a positive alert for the presence of the odor of narcotics by biting and scratching at the drawer.

CONCLUSIONS OF LAW

1. The Court has jurisdiction under 28 U.S.C. §1345 and 21 U.S.C. §881.

2. There was probable cause to seize the defendant currency and to institute this action for violation of 21 U.S.C. §881.

3. The claimant has failed to prove by a preponderance of the evidence that the defendant currency was not used in violation of 21 U.S.C. §881.

4. The United States is entitled to have a judgement entered in its favor forfeiting the defendant currency.

DATED: April 3, 1987.

/s/ William J. Rea
WILLIAM J. REA
United States District Judge

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

CASE NO. 87-5826

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

DUVAN ARBOLEDA, INDIVIDUALLY AND AS PRESIDENT OF GOLD & GEMS TRADING,
Claimant-Appellant,

v.

$215,300 UNITED STATES CURRENCY,
Defendant.

Argued and Submitted DEC. 9, 1988.

Decided Aug. 14, 1989.

Claimant appealed from judgment of the United States District Court for the Central District of California, William J. Rea, J., ordering forfeiture of $215,300 in currency found strapped to body and stuffed in clothes of airline passenger who was flying from Los Angeles to Miami. The Court of Appeals held that: (1) Government established probable cause to believe that currency was exchanged or intended to be exchanged for drugs, and (2) claimant's testimony that he "loaned" currency in question to passenger to purchase gold coins did not rebut showing of probable cause.

Affirmed.

1. Drugs and Narcotics ⚷ 25, 28

Government must establish probable cause to believe that property was exchanged or intended to be exchanged for drugs in order to justify civil forfeiture, and onus then shifts to claimant to show by preponderance of evidence that property was not involved in violation of narcotics laws or to otherwise refute Government's showing of probable cause. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 551, 21 U.S.C.A. § 881.

2. Drugs and Narcotics ⚷ 25

To meet its burden of establishing probable cause to believe that property to be forfeited was exchanged or intended to be exchanged for drugs, Government's belief that money was involved in drug trafficking must be based on more than mere suspicion. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511, 21 U.S.C.A. § 881.

3. Drugs and Narcotics ⚷ 28

In civil forfeiture action, Government established probable cause to believe that $215,300 found strapped to body and stuffed in clothes of airline passenger flying from Los Angeles to Miami via Atlanta was involved in drug trafficking; carrying of large sum of cash was strong evidence of relationship to narcotics even without presence of drugs or drug paraphernalia, as was positive canine alert for presence of narcotics on seized currency, passenger's attempts to avoid detection, fact passenger's ticket was issued by travel agency that had issued tickets for other travelers from whom detective had previously seized narcotics-related currency, passenger's nervousness, and fact passenger was bound for well-known center of illegal drug activity. Comprehensive Drug

Abuse Prevention and Control Act of 1970, § 511, 21 U.S.C.A. § 881.

4. Drugs and Narcotics ⇦ 28

In civil forfeiture action, claimant failed to carry burden of establishing by preponderance of evidence that currency seized from airline passenger was not related to narcotics trafficking, absent showing that that currency had independent innocent source and had not been used illegally; although claimant testified that he had accumulated currency in his office safe from transactions involving sale of gold and had "loaned" currency to passenger to purchase gold coins from seller, he took no receipt or other evidence of loan and was not told by passenger who "gold" seller was or where in area he was to be found and conceded that cash transactions were contrary to his usual practice of transferring funds by wire. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511, 21 U.S.C.A. § 881.

5. Drugs and Narcotics ⇦ 25

Failure to exercise due care precludes reliance upon innocent owner defense in civil forfeiture action. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511, 21 U.S.C.A. § 811.

Marc L. Barbakoff, Miami, Fla., for claimant-appellant.

Robert A. Pallemon, Asst. US Atty., Los Angeles, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Central District of California.

Before BROWNING, SCHROEDER and NOONAN, Circuit Judges.

PER CURIAM:

On April 25, 1985, Alvaro Dario Hoyos entered Los Angeles International Airport carrying $215,300 strapped to his body and stuffed in his clothes. Law enforcement agents seized the money. The district court ordered forfeiture. Duvan Arboleda appeals, claiming the money Hoyos transported on his behalf was not drug-related. We affirm.

I.

Los Angeles Police Detective Michael Farrant was on duty at the airport when Hoyos walked past with a bundle of currency protruding from a pocket in his jacket. Detective Farrant identified himself and learned Hoyos was flying from Los Angeles to Miami via Atlanta. In response to further questioning, Hoyos took $15,000 from his coat pockets and said it was all the money he had. A patdown search, during which Hoyos became "visibly shaken," confirmed the presence of a large bulge around Hoyos' waist.

Detective Farrant asked Hoyos to accompany him to the Drug Enforcement Agency airport office. On the way to the office Hoyos told Detective Farrant the money belonged to a travel agency he owned. At the office, Detective Farrant asked Hoyos for the rest of the money. Hoyos produced an additional $201,000 from his jacket, his

socks, and an apron-like cloth taped to his waist. Hoyos then told Detective Farrant that, except for $700 for personal expenses, the money was for the purchase of gold and gems. A search on the DEA's Narcotics and Dangerous Drugs Information System (NADDIS) computer revealed that Hoyos had been arrested nine years earlier on a charge of marijuana trafficking subsequently dismissed. Detective Farrant seized the currency pursuant to 21 U.S.C. § 881(a)(6), issued Hoyos a receipt for $215,300, and released him. The next day a police dog searching the DEA office alerted to the odor of narcotics by biting and scratching at the desk drawer in which the money was stored. A subsequent NADDIS search revealed a report that a person with claimant's name was a drug leader in Miami.

II.

[1] To justify civil forfeiture under 21 U.S.C. § 881, the government must establish probable cause to believe the property was exchanged or intended to be exchanged for drugs. *United States v. Dickerson*, 873 F.2d 1181 (9th Cir.1988) (as amended). If the government does so, the onus shifts to claimant to show by a preponderance of the evidence that the property was not involved in a violation of the narcotics laws, or to otherwise refute the government's showing of probable cause. *United States v. $5,644,540.00 in U.S. Currency*, 799 F.2d 1357, 1362 (9th Cir.1986)

III.

[2] To meet its burden of establishing probable cause, the government's belief that the money was in-

volved in drug trafficking must be based on more than mere suspicion. *Id.* "To pass the point of mere suspicion and to reach probable cause, it is necessary to demonstrate by some *credible evidence* the probability that the [money] was in fact" drug-related. *Dickerson*, 873 F.2d at 1184 (emphasis in original).

[3] Not all of the government's evidence was probative. A NADDIS report of a charge that was dismissed is not a credible indicia of current illegal activity.[1] We also share claimant's concern as to the general reliability of NADDIS reports.[2] Moreover, we cannot agree that flying from Los Angeles to Miami with a connection in Atlanta rather than taking a nonstop direct flight evidences an attempt to thwart surveillance. *Cf. United States v. Sokolow*, — U.S. —, 109 S.Ct. 1581, 1586, 104 L.Ed.2d 1 (1989) ("a trip from Honolulu to Miami, standing alone, is not a cause for any sort of suspicion").[3]

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[1] *Cf. United States v. United States Currency, $83,310.78*, F.2d 1231, 1236 (9th Cir.1988) (holding evidence of two prior *convictions*, in addition to a prior arrest, probative of probable cause).

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[2] The government itself has in the past conceded certain of these reports to be "unreliable," *see United States v. Portillo*, 469 F.2d 907, 908-09 (9th Cir.1972), and we have previously refused to find probable cause despite NADDIS information linking defendant to drug trafficking. *See United States v. Prim*, 698 F.2d 972, 973-74 & 977 (9th Cir.1983). Some showing of reliability should be offered by the government. *Cf. United States v. Spetz*, 721 F.2d 1457, 1464 (9th Cir.1983) (government must establish reliability of police dog used in canine search).

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[3] This is not a case like *United States v. $5,644,540.00*, where we held that *driving* to Atlanta evinced an intent to avoid heightened security in Miami's airport. 799 F.2d at 1363. Hoyos' failure to take the only nonstop flight available that night, without more, cannot be considered intentionally deceptive.

Nonetheless we conclude the reliable evidence offered by the government was sufficient in aggregate to give rise "to more than mere suspicion that the property was exchanged for drugs." *$5,644,540.00,* 799 F.2d at 1363. Carrying a large sum of cash is "strong evidence" of his relationship even without the presence of drugs or drug paraphernalia. *United States v. U.S. Currency, $83,310.78,* 851 F.2d 1231, 1236 (9th Cir.1988). So, too, is the positive canine alert for the presence of narcotics on the seized currency. *Dickerson,* 873 F.2d at 1184. In this instance, claimant's attack on the credibility of the canine alert fails. Uncontradicted trail testimony established that the particular police dog had an unblemished record for detecting narcotics, and the police had taken the necessary precautions to ensure a reasonable probability of proper identification and lack of tampering. *See id.; United States v. Spetz,* 721 F.2d 1457, 1464 (9th Cir.1983). Support was lent to the inference that the money was drug-related by Hoyos' attempts to avoid detection—through concealing and lying about the money—and by the fact that Hoyos' ticket was issued by a Miami travel agency that had issued tickets for some 20-30 other travelers from whom Detective Farrant had previously seized narcotics-related currency. *See $83,310.78,* 851 F.2d at 1236; *$5,644,540.00,* F.2d at 1363. Finally, Hoyos' nervousness and his Miami destination, a "well-known center of illegal drug activity," were probative of probable cause in combination with the other circumstances. *See Sokolow,* 109 S.Ct. at 1586-87; *United States v. $25,000 U.S. Currency,* 845 F.2d 857, 862 & n. 6 (9th Cir.1988).

We conclude that "[t]he money, combined with other persuasive circumstantial evidence ... is sufficient here to establish probable cause." *United States v. $93,685.61 in*

U.S. Currency, 730 F.2d 571, 572 (9th Cir.1984) (per curiam).

IV.

[4] We also agree with the district court that the claimant failed to carry his burden of establishing by a preponderance of the evidence that the money was not related to narcotics trafficking. To rebut the government's showing of probable cause, it was incumbent upon claimant to prove the money had an independent innocent source and had not been used illegally. *See United States v. $41,305.00 in Currency and Traveler's Checks*, 802 F.2d 1339, 1343 n.6 (11th Cir.1986).

The government's evidence suggesting drug trafficking was strong. Claimant offered his own testimony, in rebuttal. The court's ruling that claimant failed to carry his burden of proof necessarily rested upon a rejection of that testimony. Questions of credibility are for the trial court, *see United States v. One Twin Engine Beech Airplane*, 533 F.2d 1106, 1108-09 (9th Cir.1976) (per curiam); Fed.R.Civ.P. 52(a); we defer to a decision resting upon the credibility of witnesses unless it is clearly erroneous. *One Twin Engine Beech Airplane*, 533 F.2d at 1108-09. Having reviewed the evidence before the district court, we are not left with a definite and firm conviction that a mistake has been made. *United States v. Obscene Magazines, Books and Advertising Materials*, 653 F.2d 381, 383 (9th Cir.1981).

Claimant testified and was cross-examined before the court in a three-day bench trial. His testimony could be viewed as questionable on its face. He testified he had accumulated the $216,000 in his office safe from transactions

involving the sale of gold, and had "loaned" it to Hoyos to purchase gold coins from a seller in Los Angeles; he took no receipt or other evidence of the loan; he was not told by Hoyos who the Los Angeles seller was or where in the Los Angeles area he was to be found; Hoyos called him from Los Angeles on the same day he arrived to tell claimant he was unable to contact the unidentified seller, and, on claimant's instructions, returned that same day to Miami.

To support his testimony that the money was intended for an innocent purpose, claimant offered the testimony of a fellow Miami jeweler that payment in cash was a common practice in the industry and that the witness had previously carried large sums secreted on this person.[4] However, claimant conceded at trial that cash transactions were contrary to his usual practice, which was to transfer the funds by wire, *see $41,305.00*, 802 F.2d at 1345, and, when confronted by Detective Farrant, Hoyos did not offer the explanation to which claimant testified, but responded instead with the false statements and efforts to conceal outlined earlier.

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[4]Claimant also offered another witness, Dr. Terry Hall, who testified that he had conducted a study that revealed 90% of the currency in Miami and Los Angeles carried detectable amounts of controlled substances. But Hall admitted he had tested few $50 or $100 bills, the denominations carried by Hoyos.

[5] The court also did not err in rejecting claimant's argument that even if Hoyos intended an illegitimate use, it was without claimant's knowledge or consent and therefore he was "an innocent owner" and his currency could not be subjected to forfeiture. *See United States v. Tax Lot 1500*, 861 F.2d 232, 234 (9th Cir.1988). Claimant testified he took no precautions to guard against illegal use. He argues, essentially, that believing Hoyos to be "trustworthy" constituted an honest mistake in judgment. This is merely another way of pleading negligence. Failure to exercise due care precludes reliance upon the innocent owner defense. *United States v. One 1972 Chevrolet Blazer*, 563 F.2d 1386, 1389 (9th Cir.1977).

Accordingly, the order of forfeiture must be sustained.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASE NO. 87-5826

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

DUVAN ARBOLEDA, INDIVIDUALLY AND AS PRESIDENT OF GOLD & GEMS TRADING,
Claimant-Appellant,

v.

$215,300 UNITED STATES CURRENCY,
Defendant.

Before BROWNING, SCHROEDER and NOONAN, Circuit Judges.

The petition for rehearing is DENIED.